

United States Bankruptcy Court
Eastern District of Michigan
Southern Division- Flint

In re:

GARY PAUL KLAMERT,
Debtor.

Case No. 03-32919-WS
Chapter 7

_____/

FAITH EMERY,
Plaintiff,

v.

Adv. No. 03-3196

GARY PAUL KLAMERT,
Defendant.

_____/

Opinion

This matter is before the Court on Plaintiff, Faith Emery's, objection to the discharge of debt under 11 U.S.C. § 523(a)(6). The Court has concluded the debt is non-dischargeable under the statute. Plaintiff worked as a bartender for Defendant, ("Debtor") Gary Paul Clamart, the owner of Trap Door Lounge in 1995. After leaving employment with Debtor, Plaintiff filed suit against him in state court alleging sexual harassment against Debtor. On February 10, 1999, a consent judgment was entered in Plaintiff's favor in the amount of fifteen thousand dollars (\$15,000). Debtor filed for relief under Chapter 7. On October 17, 2003, Plaintiff filed this complaint objecting to the discharge of debt in the consent judgment.

I. Facts

Versions of the underlying facts vary considerably. Plaintiff claimed she was a bartender, working at a neighboring bar when Debtor came into the bar and lured her into employment at the

Trap Door by promising her a set schedule and \$0.50 more per hour. Plaintiff began her employment at the Trap Door, and did not often see Debtor at first. Plaintiff stated that she never had a relationship or a sexual encounter with Debtor. After a few months, Debtor began to come in during her shifts and sit behind the bar. Debtor would put his body up against her and grab her from behind. Despite her protests, Debtor continued to touch her against her will, grabbing her breasts, buttocks, and crotch and attempting to lift her shirt. Plaintiff claims that she screamed at him, pushed him away, and stepped on his feet, but it appeared that Debtor enjoyed seeing her upset. Debtor would buy her roses and gifts, but she threw the flowers away and left the gifts on the counter without opening them. Debtor's behavior upset Plaintiff to the extent that she was losing weight, grinding her teeth, biting her nails, and losing hair as a result. Plaintiff stated that she remained at her job because she needed the consistent income. On a Saturday morning, approximately five months after her employment began, Plaintiff went to see an attorney to explore legal remedies to the situation. When Plaintiff arrived at work the following Monday, she was fired before she could start her shift. Plaintiff claims that she was fired for seeing an attorney.

Plaintiff's sister, Denise Myers, corroborated her version of events by indicating that Plaintiff had told her of the events when they occurred. Myers stated that Plaintiff had lost weight, her complexion was affected, she bit her nails, was losing hair, and would shake when she spoke of her job. Myers told Plaintiff that what Debtor was doing was illegal and advised her to see an attorney.

Debtor claimed that he met Plaintiff when she came into Trap Door and asked if she could perform as an exotic dancer. He allowed her to work for tips, and following her dancing that evening, she went to his house and stayed the night. He stated that they did not keep dating because her boyfriend was upset about marks he had left on Plaintiff's neck. However, a week or two later,

he hired Plaintiff as a bartender at Trap Door when she came in and asked for a job. Debtor claimed that throughout the months that she worked at Trap Door he repeatedly approached Plaintiff about liquor shortages, but that the shortages continued. Debtor stated that on a Friday night, he saw Plaintiff give out two drinks and only charge for one drink, and he fired her immediately. Debtor claims that beyond the evening that she voluntarily spent the night with him, he had not touched Plaintiff. Debtor acknowledged that the state court case did not mention him firing Plaintiff for stealing, and could not explain why that fact was not presented.

The facts presented are based upon the what the Court heard, and from this, the Court concluded that Plaintiff was more credible. The foregoing are the findings of fact of the Court.

The parties agreed the consent judgment does not afford a basis for collateral estoppel purposes.

II. Relevant Law

Under Title VII of the Elliott-Larsen Civil Rights Act, MCL 37.2103(i)(iii), “[s]exual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature. . .” including “conduct or communication [that] has the purpose or effect of substantially interfering with an individual’s employment. . .or creating an intimidating, hostile, or offensive employment. . .environment.” To prevail in this action for nondischargeability, the sexual harassment award must fit within the exception to discharge under Section 523(a)(6).

Section 523(a)(6) authorizes a bankruptcy court to exclude a debtor from receiving a discharge “from any debt for willful and malicious injury by the debtor to another entity or the property of another entity.” The exceptions to discharge are to be narrowly construed in favor of the

debtor. *Mansaanto Co. v. Trantham* (*In re Trantham*), 304 B.R. 298(B.A.P. 6th Cir. 2004)(citing *Meyers v. I.R.S.*, 196 F.3d 622 (6th Cir. 1999). A party must prove by a preponderance of the evidence that a debtor committed an injury that is both wilful and malicious. *Grogan v. Garner*, 498 U.S. 279, 283, 111 S. Ct. 654 (1991).

“Willful”is defined as “deliberate or intentional.” *Mustaine v. Kennedy* (*In re Kennedy*), 243 B.R. 1, 14 (Bankr. D. Ky. 1998). For purposes of § 523(a)(6), the term “willful”modifies the word “injury.” Hence, this exception to discharge necessitates a deliberate or intentional injury, rather than a deliberate or intentional act that leads to injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974 (1998). “Malicious” is defined as a “conscious disregard of one’s duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.” *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986). An actor must desires to cause the injurious consequences of his act to commit a ‘willful and malicious injury’ as defined under Section 523(a)(6). *Geiger*, 523 U.S. at 61-62.

The Sixth Circuit has subsequently examined the “willful” component of Section 523(a)(6) in light of the *Geiger* decision. In the case of *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999), the Sixth Circuit Court of Appeals held that in order to find an injury “willful” under Section 523(a)(6), either of the following must be found: (1) the actor desired to cause the consequences of the act; or (2) the actor believed that the consequences of his act was substantially certain to result from the act. *Markowitz*, 190 F.3d at 464. Because a person will rarely admit to behaving in a willful and malicious manner, circumstantial evidence may be used to prove willful injury. *Cutler v. Lazzara* (*In re Lazzara*), 287 B.R. 714, 723 (Bankr. N.D. Ill. 2002). Whether an actor acted willfully and maliciously is ultimately a question of fact reserved for the trier

of fact. *In re Thirty acre*, 36 F.3d 697, 700 (7th Cir. 1994).

III. Discussion

The testimony in this case firmly establishes that Debtor's actions injured Plaintiff and that Plaintiff physical and mental health suffered from Debtor's unwanted physical advances. Plaintiff testified that Debtor repeatedly touched her and sexually harassed her despite her protests. Plaintiff and Myers were credible in their testimony and established that Debtor sexually harassed Plaintiff, causing her injuries. The issue in this case is whether the injury to Plaintiff was "willful and malicious."

The evidence establishes that Debtor must have believed that the consequences of his actions were substantially certain to harm Plaintiff. Plaintiff testified that she screamed at Debtor, pushed him away, and stepped on his feet, but it appeared that Debtor enjoyed seeing her upset. Debtor's actions were thus intentional and deliberate, and he knew he was injuring Plaintiff by his actions. Therefore, Debtor's actions were "willful" under *Kawaauhau v. Geiger*, 523 U.S. 57.

Plaintiff must also establish that her injury was "malicious," proving that in sexually harassing Plaintiff, Debtor acted in conscious disregard of his duties or without just cause or excuse. *In re Trantham*, 304 B.R. at 308. That Debtor's actions were in conscious disregard of his duties and without just cause or excuse there can be no doubt. One's duties to one's employees certainly must encompass not only the "do's" but also the "don't's". Surely among the latter, either at common law, or under applicable statutory enactments, is a duty to refrain from sexual harassment. Regardless, the alternative without just cause or excuse standard is clearly met by the facts. There is no cognizable cause or excuse for the debtors' recited behavior, let alone any such that might be considered "just".

Because Debtor's actions were "willful and malicious," this Court concludes that the debt is nondischargeable.

/s/ Walter Shapero
Walter Shapero
U.S. Bankruptcy Judge

Entered: October 14, 2005

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